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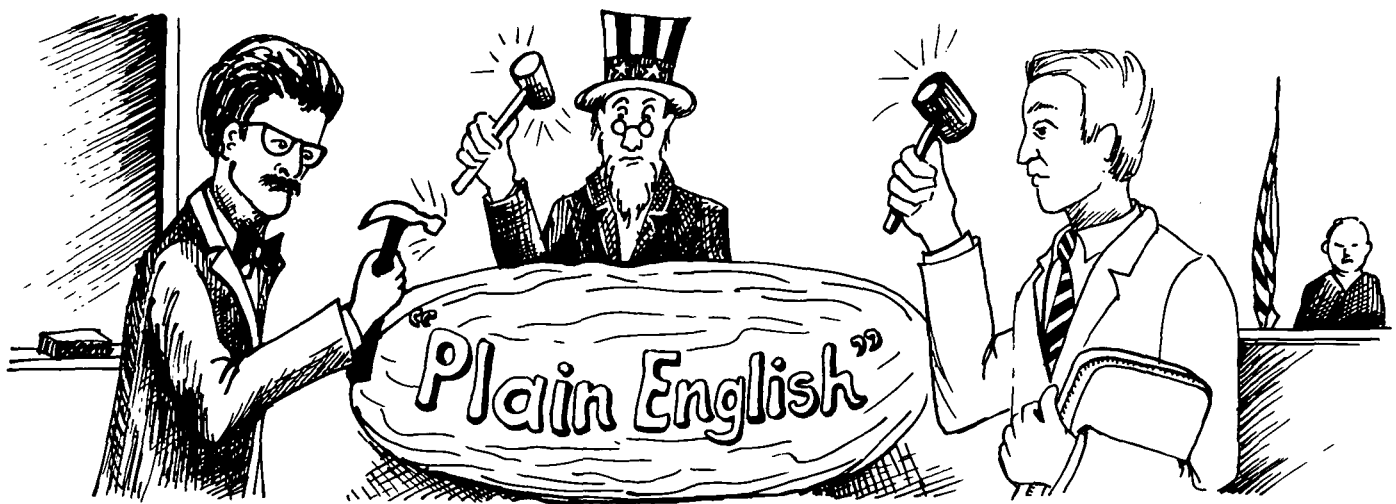
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Should Plain English Be Legislated?

By
F. Reed Dickerson

Should plain English be legislated?

My short answer is no; but, on second thought and with reservations, yes. Maybe I should enlarge on that.

It is hard to say when the complaints against lawyers' language began. Although hardly the first, Jeremy Bentham was fuming about legislative long-windedness in 1843.¹ Professor Fred Rodell, writing in 1939, said, "Almost all legal sentences . . . have a way of reading as though they had been translated from the German by someone with a rather meager knowledge of English."² Two years later someone observed that statutes were being spoken of as "disgraceful, unworkmanlike, defective, unintelligible, abounding in errors, ill-penned, inadequate, loosely-worded, depraved in style, [full of] peculiar absurdities, mischievous, baneful in influence . . . confusing, obscure, . . . overbulky, redundant, entangled, unsteady, disorderly, complex, to say nothing of being 'uncognoscible.'"³

The modern push for clear regulations began in the early 40's, following Congressman Maury Maverick's coinage of "gobbledygook" and the Office of Price Ad-

ministration's first attempts to impose price controls. Finding that America's small businessmen could not understand its regulations without the intervention of a lawyer, OPA engaged Rudolf Flesch and Professor David F. Cavers of the Harvard Law School to help the agency communicate more effectively with the people whose prices it regulated.

From OPA's experience came a body of expertise in simplifying laws that remains useful even today. Unfortunately, the movement to simplify faded with the war pressures that supported price control. The resulting passivity went undisturbed, even by the Korean and Vietnamese wars, until the explosion of the consumer movement, which recently turned its attention to documents that the typical consumers of goods and services are being persuaded to accept: insurance policies, product warranties, and credit documents. At the same time, unsophisticated businessmen were being subjected to a barrage of detailed regulations from agencies such as the Occupational Safety and Health Administration and the Environmental Protection Agency. As a result, public pressure to simplify legal instruments is greater today than it was even during World War II.

How do we solve the problem? First, we have to understand it. This involves, among other things, knowing how lawyers got into this mess. The traditional explanation, of course, has been that every discipline needs its own technical terms, some of which may be meaningless to outsiders. Also, the law often deals with matters that are inherently complicated. Both statements are true. It is also true that many special legal terms have perfectly adequate plain-English equivalents and some matters need not be as complicated as they at first seem. Here, a good case for simplification can be made.

Another explanation is that much of traditional law language is traceable to the time when it was necessary to take account of, not only Anglo-Saxon, but Norman French, Old Norse, Celtic, and Latin.⁴ This was the reason, for instance, for using couplets like "null and void," which say the same thing in different languages, but for which a need no longer exists.

Another explanation is that, so long as courts remained unfriendly to legislative changes in the common law, a draftsman had good reason to sprinkle his text with synonyms to

guide judges who responded only to special incantations. Here, too, the need has, for the most part, disappeared.

Still another explanation is that lawyers have been enmeshed in a network of outworn forms that they have been reluctant to revise if the forms have been adjudicated in court, and unable to revise if they do not understand them which is often the case. A thorough purging of offending forms would be a happy event.

But do we need a law?

The idea of legislating the specifics of good writing is highly repugnant to me and not merely because most of the people who have been writing these laws have failed to get an adequate handle on the principles of clear communication. There is also the desirability of not tying the hands of draftsmen who need elbow room.

Even so, a modest case can be made for some kind of law to help the legal profession overcome its present, partly justifiable inertia. Without it, the organized bar is unlikely to initiate effective action to improve the clarity of statutes, regulations, or other legal instruments.

To put it inelegantly, the organized bar needs a solid legislative jolt. The same is true of the law schools. I am also persuaded that this can be done without seriously compromising the principles of good draftsmanship. Because we already know how to simplify legal documents, it is high time that we get moving. Unfortunately, I have, at this moment, only a general notion of what belongs in such a legislative mandate.

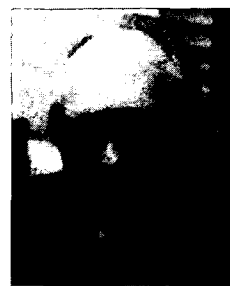
The first efforts to legislate "plain language" show widely differing approaches. New York's Sullivan law⁵ protects "consumer" documents, which are residential leases or contracts for money, property, or services for "personal, family, or household purposes" and involve \$50,000 or less. The mandated standard is "plain language," defined as language "written in a clear

and coherent manner using words with common and every day meanings." In case of non-compliance, the consumer is entitled to actual damages and a civil penalty of \$50, but not attorneys' fees or court costs. Defenses include good faith and full performance. The Attorney General may bring an action for an injunction or restitution.

Massachusetts' plain language law⁶ applies only to insurance policies. There is no money limit and the standards require (1) scoring at least 50 on the Flesch (or equivalent) readability test, applied according to detailed statutory instructions, and (2) meeting type-face standards, avoiding undue prominence of particular provisions, including a table of contents or subject index, maintaining appropriate margins and ink-to-paper contrast, and providing an organization and summary "conducive to understandability." Compliance is required only to obtain clearance from the insurance commissioner.

Connecticut's law⁷ requires "plain language" for the same general kinds of consumer contracts as New York's law protects, but only those involving up to \$25,000. Again, the standard is "plain language," except that it is tied to two alternative sets of supplementary standards. The first has 9 criteria such as length of sentences, typography, verb forms, and captions. The second has 11 criteria such as words-per-sentence, syllables-per-word, length of paragraphs, and space between paragraphs. There are elaborate instructions for counting words and determining what is a "sentence" or "syllable." Offended consumers may recover a civil penalty of \$100 plus attorneys' fees. Defenses include good faith, preparation of the contract by the consumer, attendance by plaintiff's attorney at its signing, full performance, and the expiration of six years.

Maine's plain language insurance law⁸ generally follows the Massachusetts pattern. Its plain language



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consumer loan law⁹ covers "loans made to a consumer by a supervised lender for personal, family or household purposes, if the debt is payable in installments or a finance charge is made," unless the amount involved exceeds \$100,000. Each such consumer loan contract must be in "plain language," defined as "written in a clear and coherent manner using words with common and every day meanings." It must also have a "[m]eaningful arrangement," defined as "[a]ppropriately divided and captioned by its various sections." Non-compliance is subject to legal action by the superintendent of the Bureau of Consumer Protection. However, a supervised lender may gain immunity from suit by securing the Bureau's certificate of compliance.

One trouble is that the "plain English" ideal, if not defined, is a bit off the mark. For one thing, "plain English" is in many legal contexts anything but plain. Besides, the concept suggests that there is an ideal way to

(continued on next page)

1. Nomography, or the Art of Inditing Laws, in 3 Bentham, Works (Bowring's ed. 1843) 231-83.
2. Woe Unto You, Lawyers! (Reynal & Hitchcock 0939) p. 185.
3. Indictment of the Form of Laws. Arizona News Letter No. 15, pp. 7, 9 (January 1941).
4. The Language of the Law (Little, Brown & Co., 1963), ch. 5.
5. Laws of 1977, chapter 747, as amended by Laws of 1978, chapter 199.
6. Gen. L., ch. 175, December 6, 1977.
7. P.A. 79-532, June 22, 1979.
8. P.L. 267, May 22, 1979.
9. P.O. 483, June 20, 1979.

Plain English

continued

say things that will fit all legal audiences.

Because legal audiences differ, the draftsman should be able to adjust his focus accordingly. On the other hand, no great harm is involved if such a law focuses solely on professionals who deal with unsophisticated consumers, where a Reader's Digest level of understandability, as measured for example by the Flesch readability test, makes some sense. On the other hand, it makes less sense if the effort is spread over a wider base within which audiences materially differ.

Remember, too, that readability is not the same as substantive clarity. A document can meet the Flesch or Gunning test 100 percent without rising above pure gibberish. What we should shoot for here is a general per-

formance standard of decently readable substantive clarity (as adopted by New York's Sullivan law and Maine's law on consumer loan agreements) bolstered, perhaps, by suggested specifics to be taken into account (such as type face, paragraphing, and cross-referencing), without mandating a myriad of detail (as in Connecticut's plain language law). As for "simplicity," we should seek only a simplicity that does no material violence to the substantive values that inhere in the subject matter.

Moreover, any approach to clarity that is tied only to language misses at least two important aspects of the problem. Functional clarity depends not only on clarity of language but also on clarity of concept and clarity of organization. There may also be a fourth: clarity of context. Successful communication necessarily takes account of external context, which is the part of any communication that is

already in the minds of, or readily accessible to, the legal audience. This includes the many tacit assumptions, not always readily determinable, that color the meaning of the language used. Here we are talking about the normal workings of implication.

The main value of the plain English laws I have seen appears to be symbolic. Although New York's Sullivan law is probably (in any serious sense) unenforceable because of its "good faith" defense (most bad draftsmen operate in good faith), the tangible results that it has already produced in that state are impressive.

Ultimately, good drafting will come only with better law school education. But, until we crack that nut, "plain English" laws, which are in effect in at least four states and pending in upwards of 30, may, if suitably improved, be a useful temporary expedient.

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